

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal)	CC Docket No. 96-45
Service)	

**COMMENTS OF
THE NEBRASKA RURAL INDEPENDENT COMPANIES**

I. Introduction

The Nebraska Rural Independent Companies (the “Nebraska Companies”),¹ by their attorneys, respectfully submit their comments in the above-captioned proceeding. This proceeding seeks comment on the Federal-State Joint Board on Universal Service (“Joint Board”) recommendation to the Federal Communications Commission (the “Commission”) regarding the definition of services supported by universal service.² In its *Recommended Decision*,³ the Joint Board recommended that the Commission not modify the existing list of services supported by universal service, with one exception. The Joint Board was split, and could not reach agreement on whether equal access to interexchange service should be added to the list of supported services. The Nebraska Companies appreciate the opportunity to comment on the Joint Board’s recommendations

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., Hooper Telephone Company, K&M Telephone Company, Inc., NebCom, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Pierce Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See *Federal State-Joint Board on Universal Service*, CC Docket No. 96-45, Notice of Proposed Rulemaking, FCC 03-13 (rel. Feb. 25, 2003).

³ See *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 02J-1 (rel. July 10, 2002).

regarding the definition of services to be supported by universal service. The Nebraska Companies will focus their comments on arguments in support of the inclusion of equal access to interexchange service as part of the definition of supported services.

II. The Addition Of Equal Access To The List Of Supported Services Is Not Inconsistent With The Intent Of Congress As Expressed In Section 332(c)(8) Of The Telecommunications Act Of 1996 (the “Act”).

The members of the Joint Board who oppose adding equal access to the list of supported services state that such an addition would be inconsistent with the intent of Congress as expressed in Section 332(c)(8) of the Act.⁴ Section 332(c)(8) states that CMRS providers “shall not be *required* to provide equal access.”⁵ (emphasis added) This section does permit the Commission to require unblocked access through the use of carrier identification codes or other mechanisms, if it determines that consumers are being denied access to the telephone toll service provider of their choice, and such denial is contrary to the public interest. The members of the Joint Board who oppose adding equal access to the list of supported services state that “including equal access within the definition of universal service would create an additional *requirement* for universal service support that would adversely affect CMRS carriers.”⁶ (emphasis added) However, the addition of equal access to the list of supported services would not constitute a requirement applicable to CMRS carriers generally, rather, it would create a condition that must be met in order to receive federal universal service support for those CMRS carriers that seek to receive such support.

⁴ Id. at para. 69.

⁵ See 47 U.S.C. Section 332(c)(8).

⁶ *Recommended Decision* at para. 70.

A Utah Supreme Court decision illustrates the difference between a requirement imposed on a class of carriers generally and a condition that is imposed in order to receive universal service support. In Utah, WWC Holding Co., Inc. (“WWC”) sought to have a rule in Utah Administrative Code stating that a carrier receiving state universal service support may not charge retail rates in excess of the affordable base rates for telecommunications service determined by the Utah Public Service Commission preempted on the basis that it was in conflict with 47 U.S.C. Section 332(c)(3)(A).⁷ 47 U.S.C. Section 332(c)(3)(A) states, in relevant part, that “no State or local government shall have any authority to regulate the entry or rates charged by any commercial mobile service. . . .” The court found that because the rule became applicable “only under discrete, voluntary circumstances, the element of restriction or control is absent. It is therefore not rate regulation.”⁸ The court further noted that:

Even after its voluntary decision to seek ETC status, WWC is still free to set its rates without state intervention. Only in the narrow instance of WWC’s voluntary decision to receive state universal service support must it set the price of its universal service offering at or below a specified level. And, even while receiving state universal support WWC is free to set the rates for other services without state intervention. Thus, Utah R746-360-6(B) is *a condition imposed on the receipt of state funds rather than outright rate regulation*.⁹ (emphasis added)

Similarly, in setting the definition of services to be supported by universal service, the Joint Board would be creating conditions to receive universal service support, not imposing regulations or requirements that are applicable to any carrier in its provision of services that are not supported by universal service funds. Therefore, in adding equal

⁷ *WWC Holding Co., Inc. V. Public Service Commission of Utah, et al.*, 44 P.3d 714 (Utah 2002).

⁸ *Id.* at 723.

⁹ *Id.* at 723.

access to the list of supported services, CMRS carriers would only need to provide equal access for offerings supported by universal service. Toll service provided by CMRS carriers for all other service offerings they may provide would not need to be provided on an equal access basis. As such, adding equal access to the list of supported services is not inconsistent with the intent of Congress expressed in Section 332(c)(8) of the Act.

III. In Keeping With The Goals Of The Act, Including Equal Access To Interexchange Services In The Definition Of Supported Services Would Serve To Increase Competition And Would Benefit Consumers.

The members of the Joint Board who oppose adding equal access to the list of supported services support the Commission's conclusion in the *First Report and Order*¹⁰ that such a requirement would likely reduce competition in rural and high cost areas.¹¹ Neither the Commission, nor the Joint Board members who oppose adding equal access to the list of supported services, offer any explanation for this conclusion. The only possible rationale for that statement can be found in the Separate Statement of Commissioner Kathleen Q. Abernathy, in which she indicates that "[t]he costs of complying with such a requirement undoubtedly would deter competitive entry in high-cost areas where service can be provided economically only if explicit universal service support is available."¹²

While assertions have been made by wireless carriers that there would be substantial costs to comply with an equal access requirement, the Nebraska Companies are not aware that any estimates of the cost to comply with such a requirement for

¹⁰ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order ("*First Report and Order*") FCC 97-157 (rel. May 8, 1997) at para. 79.

¹¹ See *Recommended Decision* at para. 70.

¹² *Id.* at p. 38.

wireless eligible telecommunications carriers (“ETCs”) have been presented to the Commission. Furthermore, the Nebraska Companies do not believe that the provision of wireless service in high-cost areas has hinged on whether universal service support is available. Unfortunately, the Commission’s *CMRS Competition Reports* do not offer information in great enough detail to determine the number of providers offering wireless service in each rural, high-cost area of the nation. However, a visual inspection of maps intended to furnish information on the number of providers of wireless service indicates that in June 1999,¹³ most Basic Trading Areas (“BTAs”) were served by at least two operators.¹⁴ Furthermore, at this same time, only five companies other than incumbent local exchange carriers (“ILECs”), some of which appear to be landline competitive local exchange carriers, were receiving universal service support.¹⁵ This would indicate that wireless service was generally available in rural areas prior to many wireless service providers being designated as ETCs and receiving universal service support. Moreover, while many more wireless service providers currently receive universal service support than in 1999,¹⁶ an inspection of the most current mobile telephone service coverage indicates that many rural areas of the United States still appear to be served by two

¹³ The first CMRS Competition Report to display data on the number of wireless service providers by BTA was issued in June 1999, thus, this time period was of necessity selected as the baseline for wireless service coverage. Previous CMRS Competition Reports did not contain such data.

¹⁴ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Fourth Report, FCC 99-136 (rel. June 24, 1999) at p. H-2.

¹⁵ See *Federal Universal Service Programs, Fund Size Projections and Contribution Base For the Second Quarter 1999*, Universal Service Administrative Company (rel. Jan. 29, 1999) at Appendix 1, p. 36.

¹⁶ See *Federal Universal Service Support Mechanisms Fund Size Projections For the Second Quarter 2003*, Universal Service Administrative Company (rel. Jan. 31, 2003) at Appendix HC01.

mobile service providers.¹⁷ Thus, the availability of universal service funds does not appear to have influenced the availability of wireless services or “competition,” as stated by the members of the Joint Board who oppose adding equal access to the list of supported services. While the Commission, in rendering an opinion in 1997 in the *First Report and Order*, did not have the luxury of knowledge as to how wireless service would be deployed in rural areas, the Joint Board, six years after the *First Report and Order* was issued, has the benefit of a historical record. The historical record clearly indicates that the provision of wireless services has occurred in rural areas without the need for universal service funds. Therefore, the assertion that a requirement to receive universal service funds, such as the provision of equal access, would reduce competition in rural, high-cost areas is without merit.

The foregoing discussion relates to competition in the local service market. However, the Nebraska Companies believe that if the Commission and the Joint Board are truly concerned about providing competition, there should be equal concern placed on providing competition in the toll market. As the members of the Joint Board who support adding equal access as a supported service indicated, the Commission, in 1994, stated that “equal access promotes the important objectives of consumer choice and enhances competition in the interexchange market.”¹⁸

Commissioner Abernathy notes in her separate statement that “if a wireless subscriber seeks to use the services of a particular IXC, she can presubscribe to that IXC

¹⁷ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, and Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Seventh Report (“*Seventh CMRS Competition Report*”) FCC 02-179 (rel. July 3, 2002) at p. E-2.

¹⁸ *Recommended Decision* at para. 80.

over her landline phone and also can reach the IXC on a wireless phone on a dial-around basis.”¹⁹ With regard to reaching the interexchange carrier (“IXC”) of a customer’s choice on a dial-around basis, this mechanism existed for landline service prior to the imposition of equal access requirements. The fact that equal access requirements were instituted for ILECs indicates that this was not found to be an acceptable mechanism by the courts and the Commission to access the IXC of one’s choice. Furthermore, the Commission has indicated that analysts estimate that 3 to 5 percent of wireless customers use their wireless phones as their only phone.²⁰ The Commission also notes that “there is growing evidence that consumers are substituting wireless service for traditional landline communications.”²¹ Therefore, the notion that if a customer wants to reach the IXC of his or her choice, the customer should simply use their landline service is not valid, as all telecommunications customers do not subscribe to landline service, and such proportion may be growing, as documented by the Commission.

The members of the Joint Board who oppose adding equal access to the list of supported services indicate that they believe that the offering by Commercial Mobile Radio Service (“CMRS”) carriers of “buckets of minutes that may be used for local and long-distance calling” outweighs the lack of 1+ dialing to a presubscribed IXC.²² Commissioner Abernathy makes a similar statement in noting that “allowing wireless carriers to offer consumers innovative service packages including bundles of any-distance

¹⁹ Id. at p. 40.

²⁰ See *Seventh CMRS Competition Report* at p. 32.

²¹ Ibid.

²² *Recommended Decision* at para. 71.

minutes promotes, rather than harms, consumer welfare.”²³ No rationale is presented in either instance as to why CMRS carriers could not continue to offer such bundles of minutes for local and long-distance calling if they were subject to an equal access requirement. Indeed, Commissioner Michael J. Copps in his separate statement indicates that “I look in vain for an explanation of how inclusion of equal access would preclude such plans.”²⁴

If bundles of minutes are of benefit to consumers and are competitively priced, CMRS carriers should not fear the addition of equal access to the definition of supported services, as customers would likely choose to retain such packages. It appears, based on comments filed in the Notice of Inquiry (“NOI”) concerning a review of equal access and nondiscrimination obligations of LECs, that CMRS carriers are concerned about losing their pricing advantages vis-à-vis landline carriers. Verizon Wireless notes that “[t]oday wireless carriers are able to minimize the costs of providing toll services by aggregating most outgoing long distance traffic and thereby qualifying for volume discounts from IXC’s.”²⁵ Voicestream Wireless Corporation and Western Wireless Corporation indicate that “the imposition of equal access on wireless would increase the costs mobile customers pay since the individual customer could not obtain the large-scale wholesale pricing efficiencies that a wireless carrier can obtain from one or more IXC’s.”²⁶ These

²³ Id. at pp. 39-40.

²⁴ Id. at p. 59.

²⁵ See *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, (“*NOI on LEC Equal Access*”) Reply Comments of Verizon Wireless (filed June 10, 2002) at pp. 4-5.

²⁶ See *NOI on LEC Equal Access*, Joint Reply Comments of Voicestream Wireless Corporation and Western Wireless Corporation (filed June 10, 2002) at p. 3.

statements indicate that wireless carriers wish to continue to exert monopoly-like control over their customers' access to IXCs. This situation is analogous to the control the Bell Operating Companies ("BOCs") exerted over their customers' access to IXCs, which led to the imposition of equal access requirements on the BOCs. In fact, AT&T noted in a proceeding addressing equal access obligations of LECs that equal access obligations were imposed on the BOCs because the BOCs could abuse their market power by favoring an unaffiliated IXC and share in the gains of that favoritism through some side deal.²⁷ The Nebraska Companies fail to understand why such requirements were deemed desirable to be applied to the BOCs, GTE, and virtually all independent LECs, but would not be desirable to be applied to wireless ETCs. In fact, many wireless ETCs have far more customers than many independent LECs, therefore, they exert greater control over the toll market by controlling the access of their customers to such market. In fact, this anti-competitive posturing by wireless companies is especially concerning when one recognizes that these same wireless ETCs will be able to continue to control the toll market and at the same time receive universal service support.

The members of the Joint Board who oppose adding equal access to the list of supported services further assert that equal access obligations were established to address competitive concerns in the interexchange market at a time when the competitive landscape was quite different than it is today.²⁸ For example, Commissioner Abernathy states "I am frankly puzzled by the argument that we need to adopt an intrusive and backward-looking regulatory requirement for CMRS carriers. Indeed, as the Commission

²⁷ See *NOI on LEC Equal Access*, Comments of AT&T Corp. (filed May 10, 2002) at p. 3.

²⁸ See *Recommended Decision* at para. 69.

is considering whether equal access obligations continue to be necessary even for ILECs.”²⁹ A review of comments filed in that proceeding, which were available prior to the Joint Board issuing its *Recommended Decision*, indicate that interexchange carriers that are not also ILECs did not favor removing the equal access requirement from ILECs.³⁰ Therefore, the Nebraska Companies fail to see how it can be argued that the competitive landscape is different today, in terms of the need for an equal access requirement, than it was when such requirement was imposed.

Commissioner Abernathy asserts that adding equal access to the list of supported services is not necessary to promote competition and consumer choice because “none of the IXCs that participated in this proceeding—the would-be beneficiaries of an equal access requirement—supported the imposition of such a requirement.”³¹ On the other hand, with the exception of AT&T, no interexchange carrier expressly objected to adding equal access to the list of supported services. AT&T objected to subjecting CMRS carriers to providing equal access in order to receive universal service support on the basis that such a requirement “would thwart competition from alternative providers in rural areas,” an argument addressed previously in these comments.³² However, it must be considered that AT&T, as well as many RBOCs that are now interexchange carriers, have CMRS affiliates. These carriers stand to gain from not including equal access in the list of supported services, as they can route their wireless toll traffic to their interexchange

²⁹ Id. at p. 41.

³⁰ See *NOI on LEC Equal Access*, Comments of AT&T Corp. at pp. 1-3 and WorldCom Comments at pp. 1-2 (filed May 10, 2002).

³¹ *Recommended Decision* at p. 40.

³² See *Federal-State Joint Board on Universal Service; Review of the Definition of Universal Service*, CC Docket No. 96-45, Reply Comments of AT&T Corp. (filed Jan. 4, 2002) at p. 14.

affiliate. Thus, simply because IXC's did not support the inclusion of equal access in the definition of supported services, it cannot be assumed that inclusion of equal access is not necessary to promote competition and consumer choice. Indeed, AT&T's sole opposition to the requirement should serve as a warning signal that the dominance of wireless carriers and their wholesale toll providers will expand to the universal service market, where ILECs have equal access obligations under separate Commission requirements, and customers have benefited from the competition that has resulted.

Finally, Commissioner Abernathy notes that "the focal point of the debate over equal access remains competition, rather than universal service."³³ The Nebraska Companies are puzzled by this statement, and disagree with it. The Nebraska Companies are puzzled in that the members of the Joint Board who oppose the inclusion of equal access in the definition of supported services objected based on the argument that it would likely reduce competition in rural and high cost areas.³⁴ Thus, the Joint Board members themselves seem to be focused on the issue of promoting competition through universal service policy. Furthermore, the Nebraska Companies disagree that the issue of whether or not to include equal access in the definition of supported services is strictly an issue of competition. In fact, the Nebraska Companies believe that the inclusion of equal access is supported by statutory requirements. Section 254(b)(3) of the Act states that:

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at

³³ *Recommended Decision* at p. 39.

³⁴ *See Recommended Decision* at para. 70.

rates that are reasonably comparable to rates charged for similar services in urban areas. (emphasis added)

If the Joint Board members who oppose the addition of equal access to the list of services supported by universal service believe that wireless service providers will offer competitive alternatives in the provision of universal service in rural, high-cost areas, then the Nebraska Companies suggest that wireless service providers should provide equal access to interexchange service in order to comply with statute. The provision of equal access would ensure that customers in rural, high-cost areas would have access to interexchange services that are reasonably comparable to those services provided in urban areas, where ILECs and landline CLECs offer equal access to interexchange service. Certainly, should wireless carriers not wish to provide equal access, they would have the option of not doing so. They just would not be able to receive universal service funding unless they met this pro-competitive requirement. Therefore, it would be the wireless carriers themselves that control this decision, and the customers in the end would benefit.

IV. Conclusion

The Nebraska Companies appreciate the opportunity to comment on the definition of services supported by universal service, and particularly on the inclusion of equal access in the list of supported services. The Nebraska Companies believe that the inclusion of equal access in the definition of supported services is a condition to receive support, and is not a requirement that is prohibited by Section 332(c)(8) when CMRS carriers seek to receive universal service support. Further, adding equal access to the definition of universal service would continue to promote competition in the interexchange market, while having no adverse effect on competition in the basic local

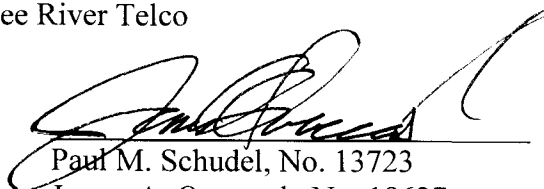
exchange service market. Finally, the inclusion of equal access in the definition of supported services would help ensure that the Commission is meeting the requirements of Section 254(b)(3) of the Act, by offering rural customers access to services that are comparable to those offered in urban areas, specifically with respect to interexchange service.

Dated: April 14, 2003.

Respectfully submitted,

Arlington Telephone Company
Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telephone Company,
Consolidated Telco Inc.,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Company,
Inc.,
Hooper Telephone Company,
K&M Telephone Company, Inc.,
Nebcom, Inc.,
Nebraska Central Telephone Company,
Northeast Nebraska Telephone Company,
Pierce Telephone Co.,
Rock County Telephone Company,
Stanton Telephone Co., Inc., and
Three River Telco

By:



Paul M. Schudel, No. 13723

James A. Overcash, No. 18627

WOODS & AITKEN LLP

301 South 13th Street, Suite 500

Lincoln, Nebraska 68508

(402) 437-8500

(402) 437-8558 Facsimile